U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 May 2007

In the Matters of:

EXPRESS PHOTO, INC.,
Employer,

on behalf of

GILAD ROBIN,

BALCA No.: 2005-INA-00128
ETA No.: 2004-NV-09580642

and

RONI DERY,

BALCA No.: 2005-INA-00139
ETA No.: 2004-NV-09580640

Aliens.

SPRINT NEXTEL,
successor to
SPRINT UNITED MANAGEMENT COMPANY,
Employer,

on behalf of

JAYACHANDRA KADIAM,

BALCA No.: 2006-INA-00006
ETA No.: P2002-KS-05416184

SURYANARAYANAN RAMAMURTHY,

BALCA No.: 2006-INA-00007
ETA No.: P2003-KS-05417535

XIANGHONG ZENG,

BALCA No.: 2006-INA-00010
ETA No.: P2003-KS-05417536

NANDANA THILAKASIRI MADDUMAKUMARA,

BALCA No.: 2006-INA-00011
ETA No.: P2002-KS-05416558

and

PAVAN KUMAR CHERVELA,
Aliens.

BALCA No.: 2006-INA-00012
ETA No.: P2002-KS-05416054

EMBARQ,
successor to
SPRINT UNITED MANAGEMENT COMPANY, [1]
Employer,

on behalf of

GIRISH PRABHAKAR JOSHI,
Alien.

BALCA No.: 2006-INA-00008
ETA No.: P2003-KS-05419439

Certifying Officer:
Martin Rios
San Francisco

Appearances: Judy Bordeau, Esquire
Eisberg & Bordeau, Mission, Kansas
For Embarq and Girish Prabhakar Joshi

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
R. Peter Nessen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
For the Certifying Officer

Geoffrey Forney, Esquire
Klasko, Rulon, Stock & Seltzer, LLP, Philadelphia, Pennsylvania
For Amicus, American Immigration Lawyers Association

Pascale Henn, Esquire
Embarq, Overland Park, Kansas
For Embarq and Girish Prabhakar Joshi

[1] On November 30, 2006, the Board received a letter from in-house counsel for Embarq which explained that in 2006 Sprint Corporation merged with Nextel Corporation to form a new corporation, Sprint Nextel. A "spin-off" company resulting from this merger is Embarq which, according to the letter is the "successor-in-interest to Sprint on all immigration related matters for foreign national employees affected by the spin off." According to the letter, Mr. Girish Joshi is an employee of Embarq, and Ms. Bordeau is Embarq's attorney in the instant matter.

Roger K. McCrummen, Esquire
The McCrummen Immigration Law Group, LLC
For Sprint Nextel, Suryanarayanan Ramamurthy, Nandana Thilakasiri Maddumakumara, Jayachandra Kadiam, and Xianghong Zeng[2]

James J. Orlow, Esquire
Orlow and Orlow, PC
For Express, Photo, P.C., Gilad Robin and Roni Dery

Before: **Burke, Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

These matters arise under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[3] The issue is whether – if the Certifying Officer grants a reduction in recruitment ("RIR") under 20 C.F.R. § 656.21(i), but finds that the application failed to document adequate consideration of U.S. workers or unlawful rejection of a U.S. worker – the CO can deny the application at that point, or must the CO refer the application for "supervised" or "traditional" recruitment.

BACKGROUND

In August 2006, a panel of the Board issued three decisions relating to the RIR regulation at 20 C.F.R. § 656.21(i). Those decisions were *Express Photo, Inc.*, 2005-INA-128 and 139 (Aug. 11, 2006), *Oracle USA, Inc.*, 2006-INA-29 through 33 (Aug. 21, 2006), and *Sprint United Management Co*., 2006-INA-6 through 8, 10 through 12 (Aug. 21, 2006). In the *Oracle* and

[2] Michael K. Ungar, Esquire, appeared for Sprint United Management Co, and Pavan Kumar Chervela before the panel; however, the Board does not have a record of receipt of an appellate brief from Mr. Ungar in this en banc proceeding.

[3] All of the applications in these matters were filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Sprint appeals, the Certifying Officer (CO) granted an RIR, but then denied the applications for failure to document adequate consideration of U.S. workers who had been laid-off by the Employers within the six months immediately preceding the date that the CO issued the Notices of Findings. In the *Express Photo* appeal, the CO granted an RIR, but then denied the applications based on unlawful rejection of a U.S. applicant. The panel found that when the CO denied the applications for failure to give adequate consideration to the U.S. workers, he in effect either constructively denied the RIR or, at most, only granted a partial RIR. The panel concluded, therefore, that under 20 C.F.R. § 656.21(i)(5), the applications should have been remanded for "supervised recruitment."

The Certifying Officer filed a Request for Rehearing En Banc Review in regard to these decisions. The CO argues that there is a distinction between the adequacy of recruitment and the adequacy of consideration of the applicants found during the recruitment. The CO argues that the Employers were required to either offer those U.S. workers employment or adequately explain why the Employers did not do so. The CO also argues that the RIR regulation renders it impossible for the Employers to cure the faults with their applications.

On October 19, 2006, the Board granted en banc review.

On December 4, 2006, the Board dismissed the appeals involving Oracle USA, Ltd. based on the Employer's request that all of the applications relevant to this en banc proceeding be withdrawn. Accordingly, this en banc proceeding now only relates to the Sprint Nextel/Embarq and Express Photo appeals.

Timely briefs were filed by attorneys appearing on behalf of Sprint Nextel, Embarq, Express Photo, and amicus, the American Immigration Lawyers Association. The CO did not file a brief, but choose to rely on the arguments made in his Request for Rehearing En Banc.[4]

[4] Although the briefs touched on many aspects of these cases, we will not address issues on which a petition for en banc review was not filed. *See Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001) ("It is a basic tenet of appellate practice and procedure that the reviewing court will not address rulings of the trial judge that the parties do not challenge on appeal.").

DISCUSSION

Overview – BALCA Caselaw

Reduction in Recruitment processing "is an alternative to the basic labor certification process in which a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at the prevailing wage and working conditions. 20 C.F.R. § 656.21(i)." *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003).[5] The basic labor certification process is often colloquially referred to as "traditional" or "supervised" recruitment.

In the Board's Order Granting En Banc Review, reply briefs were prohibited. On December 6, 2006, counsel for the CO faxed to the Board a letter making an observation that Sprint's [actually Embarq's] brief did not address the issue on which en banc review was granted, but rather was an argument on why it should have been permitted not to consider laid-off workers. The CO requested leave to reply if the Board was to consider those arguments. Since we will not re-visit the issue of whether the CO properly found that Sprint's pre-application recruitment had not sufficiently considered laid off workers, the CO's request is moot.

On December 22, 2006, counsel for the CO faxed to the Board a letter commenting on AILA's amicus brief. The CO's letter prompted a reply from counsel for AILA, and a reply and motion to remand from counsel for Express Photo. Because the CO's observation on AILA's brief helps to define the how the CO views the structure of the regulatory program, and because for the reasons stated in the text of our decision below we disagree with the CO's premise, we will consider the CO's observation and the responses thereto.

Express Photo's motion to remand is premised on the CO having imposed an undisclosed penalty on it. The CO's letter, however, is just argument, and we deny a remand on this basis.

[5] The text of the RIR regulation states:

> **§ 656.21 Basic labor certification process.**
>
> * * *
>
> (i) The Certifying Officer may reduce the employer's recruitment efforts required by §§ 656.21(f) and/or 656.21(g) of this part if the employer satisfactorily documents that the employer has adequately tested the labor market with no success at least at the prevailing wage and working conditions; but no such reduction may be granted for job offers involving occupations listed on Schedule B.
>
> (1) To request a reduction of recruitment efforts pursuant to this paragraph (i), the employer shall file a written request along with the Application for Alien Employment Certification form at the appropriate local Job Service office. The request shall contain:
>
> (i) Documentary evidence (which shall include, but is not limited to, a pre-application notice posted consistent with § 656.20(g) of this part) that within the immediately preceding six months the employer has made good faith efforts to recruit U.S. workers for the job opportunity, at least at the prevailing wage and working conditions, through sources normal to the occupation; and

For many years, BALCA rarely docketed appeals containing issues relating to rulings on RIR requests. In the mid-1990s, however, RIR started being actively promoted by the Employment and Training Administration (ETA) as an alternative procedure – for the right kind of case – for avoiding the lengthy and resource draining "traditional" recruitment process.[6] Over the past decade, RIR processing became a central component of pre-PERM labor certification application processing.

As RIR gained significance as a parallel track for labor certification applications, BALCA began docketing appeals in which the CO used the familiar NOF/Rebuttal/Final Determination model to process cases which were in the posture of an RIR request. In *Compaq*

> (ii) Any other information which the employer believes will support the contention that further recruitment will be unsuccessful.
>
> (2) Upon receipt of a written request for a reduction in recruitment efforts pursuant to this paragraph (i), the local office shall date stamp the request and the application form and shall review and process the application pursuant to this § 656.21, but without regard to §§ 656.21(f), 656.21(g), and 656.21(j)(1) of this part, advertisement, and job order; and the wait for results).
>
> (3) After reviewing and processing the application pursuant to paragraph (i)(2) of this section, the local office (and the State Employment Service office) shall process the application pursuant to paragraphs (j)(2) and (k) of this section.
>
> (4) The Certifying Officer shall review the documentation submitted by the employer and the comments of the local office. The Certifying Officer shall notify the employer and the local (or State) Employment Service office of the Certifying Officer's decision on the request to reduce partially or completely the recruitment efforts required of the employer.
>
> (5) Unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required by §§ 656.20(g), 656.21(f), 656.21(g), and 656.21 (j) of this part (i.e., by post-application internal notice, employment service job order, and advertising; and a wait for results). If the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer then shall determine, pursuant to § 656.24 whether to grant or to deny the application.
>
> (6) Notwithstanding the provisions of paragraph (i)(1)(i) of this section, an employer may file a request with the SESA to have any application filed on or before August 3, 2001, processed as a reduction in recruitment request under this paragraph (i), provided that recruitment efforts have not been commenced pursuant to paragraph 656.21(f)(1) of this section.

[6] *See, e.g.,* 71 Fed. Reg. 59336 (Oct. 6, 2006) (explanation in Background section of the preamble); Survey of Labor Certification Practices, AILA InfoNet Doc. No. 01010211 (posted Jan. 2, 2001) (AILA chart showing that most ETA Regions were promoting RIR). *See also Compaq Computer*, 2002-INA-249 (Sept. 3, 2003), slip op. at n.3 (GAL 1-97 (Oct. 1, 1996), re-issued as GAL 1-97, Change 1, and published in the Federal Register on May 4, 1999, was originally issued to promote the RIR process in order to increase efficiency in the permanent labor certification regulations to attempt to deal with increasing workloads with simultaneous declines in staff resources).

Computer, *supra*, a panel of the Board ruled that that a denial of an RIR request mandates a remand[7] for non-RIR processing.[8] Subsequent to *Compaq Computer*, the Board began docketing appeals in which the CO "granted" the RIR, but went on to deny the application based on deficiencies in the recruitment. A panel of the Board noted concern about this practice in *Sun Microsystems*, 2003-INA-302 (June 2, 2004), in which the panel granted the CO's motion on reconsideration to permit the granting of an RIR and the issuance of a new NOF rather than a remand for supervised recruitment, but in which the panel also expressed strong reservations about the procedural fairness of proceeding in this fashion, and granted the motion only because it was not opposed by the Employer. Similarly, in *SKH Trading Co., Inc.*, 2005-INA-152 (Sept. 15, 2005), slip op. at n.5, the panel stated that it would be wary of a CO attempting to get around a *Compaq Computer* remand by using the fiction of granting an RIR, when in reality it was constructively denying the RIR. It was not until the *Oracle/Sprint/Express Photo* trio of decisions, however, that a panel of the Board squarely addressed the issue of a CO simultaneously granting an RIR, but also proposing to deny the application based on deficiencies with the employer's recruitment.

Regulatory History

The Original Part 656 Rule

The pre-PERM Part 656 regulations were promulgated in 1977. ETA, *Final Rule*, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 20 C.F.R. Part 656, 42 Fed. Reg. 3440 (Jan. 18, 1977). Those regulations required an employer to

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[7] Under current ETA procedure, supervised recruitment would occur before an appropriate Backlog Elimination Center (BEC) rather than a State Workforce Agency. *See* 69 Fed. Reg. 43716 (July 21, 2004).

[8] Subsequent to the *Compaq Computer* decision, panels of the Board ruled that a remand for supervised recruitment is not mandated if the reason for the denial cannot be cured by a supervised recruitment. *See, e.g., Beith Aharon*, 2003-INA-300 (Nov. 18, 2004) (lack of a bona fide job opportunity); *Beverly Fetner*, 2004-INA-30 (Mar. 8, 2005) (lack of sufficient funds to pay the alien's wages); *Crosslands Transportation Inc.*, 2005-INA-198 (Jan. 22, 2007) (failure to establish that part of the salary offer was not based on commissions in violation of 20 C.F.R. §656.20(c)(3)); *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004) (failure to comply with a deadline set by the CO for responding to the CO's inquiries about an RIR request); *Smith Group Inc.*, 2005-INA-39 (Nov. 27, 2006) (refusal or failure to agree to amend offered wage to prevailing wage rate).

document that it "has advertised and is still advertising the job opportunity without success…" 42 Fed. Reg. at 3445, 20 C.F.R. § 656.21(b)(9)(i), and to attach to its application at least one advertisement describing the job with particularity. 42 Fed. Reg. at 3445, codified at 20 C.F.R. § 656.21(b)(9)(iv). An employer was required to document that it rejected any U.S. applicants solely for lawful job-related reasons. 42 Fed. Reg. at 3446, 20 C.F.R. § 656.21(b)(15). In addition, the employer was required to place a job order with the local job service for 30 calendar days, and to advertise the job in a newspaper of general circulation, except that the 30 day period could be reduced by the Regional CO for "good cause shown" at the request of the local job service. 42 Fed. Reg. at 3446, 20 C.F.R. § 656.21(g)(1) and (2). In determining whether to grant certification or to issue a Notice of Findings, the CO was required to "look at the documented results of the employer's and the employment service office's recruitment efforts, and . . . determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers." 42 Fed. Reg. at 3447, 20 C.F.R. § 656.24(b)(2)(i).

Thus, under the original version of Part 656, both an employer's pre-application and post-application recruitment was considered in determining whether to grant certification. In fact, an employer was required to have attempted to recruit U.S. workers before it could even apply for labor certification. In other words, the pre-PERM regulatory procedure of supervised recruitment with the option of an RIR in appropriate cases was not part of the original regulatory scheme of Part 656.

1980 Amendments to Part 656

In January 1980, ETA issued proposed amendments to Part 656. ETA, *Proposed Rule*, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 20 C.F.R. Part 656, 45 Fed. Reg. 4918 (Jan. 22, 1980). The proposal included changing the process for post-application recruitment, and replacing the entire subsection 656.21(b) with more rigorous and detailed requirements, but also providing for a reduction in certain of the employer's recruitment efforts "for good cause shown." 45 Fed. Reg. at 4925, proposed 20 C.F.R. § 656.24(b)(2)(i). The amendments were finalized by publication in the Federal Register in

December 1980. ETA, *Final Rule*, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 20 C.F.R. Part 656, 45 Fed. Reg. 83926 (Dec. 19, 1980). The preamble to the Final Rule, as well as the changes made the regulations, indicate a shift in emphasis to provide DOL with an improved fact-finding process to support denying or granting a labor certification, and to put greater emphasis on the role of local job services in assisting employers in finding qualified U.S. workers and in serving the fact-finding process. The overall effect of the changes was to place more emphasis on the recruitment done by the employer under the supervision of the local job service. Employers were no longer required to show that they had engaged in pre-application recruitment. The employer was required to document its efforts to recruit through "other sources;" but unlike the earlier version of Part 656, the regulation noted that employers may be required to recruit with other sources after the filing of the application if appropriate to the occupation. The amendments included the RIR provision. This provision is still in effect for pre-PERM applications, except that the rule was amended in 2001 to permit RIR requests to be based on post-application recruitment in certain circumstances. *See* 66 Fed. Reg. 40584, 40590 (Aug. 3, 2001).[9]

The Technical Assistance Guide No. 656

The *Technical Assistance Guide No. 656* (USDOL-ETA Sept. 1981) ("TAG") was published in 1981 by the Employment and Training Administration. The TAG was intended to provide operating guidelines, related reference materials, and background and resource information to assist state job service agencies and ETA regional offices in carrying out the permanent labor certification program. Because the TAG was published within a year of the amended regulations, it provides good evidence of ETA's interpretation of the RIR regulation at the time. The TAG stated:

> a. Prior Recruitment. The employer is not required to test the labor market before filing a request for labor certification and failure to conduct prior recruitment cannot be used as a basis to deny processing the application. However, the employer's recruitment efforts after filing an application may be reduced, if the employer can document that the labor market was adequately

[9] *See* n.5, *supra* for the full text of the RIR rule that currently applies to pre-PERM cases.

> tested during the six months previous to filing the application (see Section 656.21(i) for procedure).
>
> The employer **may** file proof of its efforts to recruit U.S. workers with the local office with the application for labor certification. This documentation should include the information required at 656.21(b)(l)(i) and (ii) if the employer is requesting a reduction in recruitment.

TAG at 45 (emphasis added). Thus, the TAG indicates that ETA did not require an employer to provide documentation of its pre-application recruitment following the 1980 amendments. As relevant to the instant appeals, this indicates that if an employer had conducted recruitment that would have been insufficient to meet the requirements of Part 656, it was not obliged to report it to DOL.

The TAG also stated:

> 9. Reduction of Recruitment.
> Paragraph 656.21(i) allows the certifying officer to reduce partially or completely the employer's recruitment efforts through the State employment service ….
>
> This provision may be exercised when it is clear to the certifying officer that the labor market has been adequately tested within the six months before filing the application….
>
> The prior recruitment must have been conducted at wages and working conditions which were prevailing or more than prevailing at that time. If wages and working conditions do not appear to the local office to have been prevailing at the time of recruitment, the employer should be advised to conduct the prescribed recruitment through the local office at prevailing wages and working conditions or the employer may document that they were prevailing when prior recruitment was conducted.
>
> * * *
> If the reduction of recruitment is denied or partially reduced, the certifying officer shall return the application to the State agency with specific instructions for processing and send a copy of the decision to the employer.

TAG at 62-64. The CO's authority to exercise the RIR provision when it was "clear" that there had been an adequate testing of the labor market suggests that the CO would not just be looking at whether the sources of recruitment were adequate, but whether the overall testing was

adequate. The discussion of wages and working conditions suggests that deficiencies with a pre-application recruitment would not be fatal to an application if the employer conducted a prescribed recruitment through the local job service. *See also* TAG at 51 (the local office may suggest post-application recruitment with other sources, and the CO may require such).

1996 General Administration Letter 1-97

In 1996, ETA issued General Administration Letter (GAL) 1-97 (Oct. 1, 1996).[10] This GAL was issued to promote the RIR process in order to increase efficiency in the permanent labor certification regulations to attempt to deal with increasing workloads with simultaneous declines in staff resources. In pertinent part, GAL 1-97 states:

> *B. Measures to Increase Efficiency*
>
> * * *
>
> 2. Reduction in Recruitment Requests (RIRs)
>
> Regions and SESAs will encourage reduction in recruitment requests on applications:
>
> — For occupations for which there is little or no availability;
>
> — Which have no restrictive requirements;
>
> — Which meet prevailing wage; and
>
> — For which the employer can show adequate recruitment through sources normal to the occupation and industry within the previous 6 months
>
> RIR requests will be given expedited processing by SESAs and Regional Offices.
>
> * * *

[10] GAL 1-97 was later re-issued as GAL 1-97, Change 1, and subsequently published in the Federal Register ETA, *Notice, Measures for Increasing Efficiency in the Permanent Labor Certification Program*, 64 Fed. Reg. 23984 (May 4, 1999).

The GAL's reference to "adequate recruitment" is not stated to be limited to a review of the sources used for recruitment but rather suggests broad discretion to review all aspects of an employer's recruitment effort. In a subsequent paragraph, the GAL states:

> 7. Standardized Recruitment
>
> When the Certifying Officer requires the employer, through an NOF, to recruit again because of deficiencies in the first recruitment, the employer shall be instructed to place a 1-day Sunday advertisement in an appropriate newspaper of general circulation. The ad must run in conjunction with a 10-day job order placed with the SESA. This reduced level of recruitment may not be used by employers who have never recruited for the position, or when the Certifying Officer has determined that a trade or professional journal is the most appropriate advertising medium.
>
> * * *

This provision of the GAL indicates that deficiencies in the first recruitment may be remedied through additional recruitment as instructed by the CO. The paragraph does not state that deficiencies in recruitment are limited to findings about the sources of recruitment. The GAL continues:

> *C. Operating Procedures*
>
> * * *
> 2. Reduction in Recruitment Requests (RIRs)
>
> a. An employer may file a reduction in recruitment request for any occupation, except those listed on Schedule B, if the employer can show that an adequate test of the labor market has occurred at prevailing wages and working conditions through sources normal to the occupation and industry within the previous 6 months.
>
> b. SESAs and Certifying Officers will encourage requests for reduction in recruitment in occupations with little or no availability and in circumstances as determined by individual Certifying Officers.
>
> c. Upon receiving an employer's written request for a reduction in recruitment, the SESA shall review the application for completeness and determine the appropriate prevailing wage.

d. The SESA shall return the application to the employer for correction and/or additional information if there are deficiencies in the application, such as an inadequate wage offer or restrictive job requirements.

e. When there are deficiencies in the application that would have affected the recruitment, the SESA should advise the employer that it is unlikely that the Certifying Officer will approve an RIR and suggest that the employer recruit through the regular process. However, the SESA may not discourage the use of RIR nor refuse to transmit a written request for an RIR to the Certifying Officer.

This paragraph indicates that a SESA (State Employment Security Agency, later renamed State Workforce Agency or SWA), could advise an employer to pursue regular recruitment rather than RIR when deficiencies in the application would have affected the recruitment. The paragraph does not state that this advice giving role is limited to deficiencies in the sources of recruitment. This paragraph continues:

f. When transmitting the RIR to the Certifying Officer, the SESA should include a recommendation, based on its knowledge of the labor market, for or against granting the request.

g. The RIR will be given expedited processing at the Region if it contains no deficiencies. Those with deficiencies identified by the SESA shall be processed in the order that they are received along with other applications.

h. Among the factors to be considered by the Certifying Officer in making determinations on RIRs pursuant to section 20 CFR 656.24 are the following:

- Adequacy of the recruitment conducted by the employer applicant, e.g., newspaper advertising, job fairs, internet.
- Documentation of normal recruitment practices in the industry and occupation furnished by the employer.
- Availability of U.S. workers for the occupation involved in the employer's application for which recruitment has been conducted through the SESA in the past, as shown by ES referrals to job orders.
- SESA recommendations/comments.
- Certifying Officer's knowledge of the local labor market.

If RIR is denied because the recruitment is not acceptable, the application shall be returned to the SESA for regular processing in the order in which it is received along with other applications.

> i. If the RIR request contains deficiencies, such as inadequate wage offer or restrictive job requirements, the Certifying Officer shall issue an NOF denying the RIR and citing the deficiencies.
>
> * * *

The first bullet point under Paragraph C.2.h. of GAL relates to deficiencies in the sources of recruitment, but only lists such deficiencies as an example of the kind of factors that a CO should consider when deciding whether to grant an RIR. The summary at the end of paragraph C.2.h. provides that an unacceptable recruitment resulting in denial of an RIR should result in returning the application for regular processing, which is essentially the ruling of *Compaq Computer, supra*. Paragraph C.2.i. states that a CO should issue an NOF (Notice of Findings) denying the RIR and citing the deficiencies if the RIR request contains deficiencies such as inadequate wage offer or restrictive job requirements. This language possibly could support the CO's position on this appeal. However, we note that the examples given of deficiencies appropriate for an NOF (failure to offer the prevailing wage and restrictive job requirements) are the types of defects that, if not satisfactorily rebutted or corrected by the employer prior to supervised recruitment, would leave the application so fundamentally deficient that a remand for supervised recruitment would be pointless. *See* n.8, *supra* (BALCA panel decisions noting "fundamental flaw" exception to *Compaq Computer* remand rule). Moreover, we also note that the RIR regulations do not prescribe a NOF/Rebuttal/Final Determination procedure for ruling on RIR requests. Rather, the issuance of a NOF is a procedure by which the CO states intent to deny the application. *See* 20 C.F.R. § 656.3 (definition of "Notice of Findings"). Use of the NOF/Rebuttal/Final Determination model to rule on an RIR request is reasonable insofar as both the COs and the immigration bar are familiar with that process. Moreover, GAL 1-97's direction to CO's to anticipate problems with an application by issuing an NOF after denying an RIR, but prior to remanding for supervised recruitment, was a reasonable administrative attempt to get uncertifiable cases out of the system prior to wasting resources on a supervised recruitment. However, use of the NOF/Rebuttal/Final Determination, in itself does not define the scope of the CO's authority to deny an application at the denial-of-an-RIR stage of the case.

In sum, GAL 1-97 directed COs to deny an RIR if recruitment was not acceptable, and return the application for regular processing. It provides little, if any, support for defining an unacceptable recruitment as merely a consideration of whether appropriate sources were used in recruitment, but rather suggests that a CO could look at any aspect of recruitment in determining whether to grant or deny an RIR request.

2000 Amendments to Part 656

In 2000, ETA proposed amendments to Part 656 related to the RIR process. ETA, *Proposed Rule, Refiling of Applications, Labor Certification Process for the Permanent Employment of Aliens in the United States*, 20 CFR Part 656, 65 Fed. Reg. 46082 (July 26, 2000). As relevant to the instant appeals, the proposed amendments addressed RIR requests in paragraph E of the preamble. The discussion begins by describing GAL 1-97 and stating that it had worked well in assisting ETA to manage increasing case loads with limited staff resources. To leverage that success, ETA determined that it would amend the RIR rule to permit employers, under certain conditions, to convert applications that were not originally filed with RIR requests to RIR processing. One of the critical conditions for conversion was that supervised recruitment had not yet commenced. ETA wrote: "Since the RIR procedure is designed to expedite processing by permitting employers to substitute recruiting conducted prior to filing the application for the recruitment required by § 656.21, it would be incongruous to entertain an RIR request from an employer who had already engaged in the mandated recruiting. Those applications should be approved or denied based on that recruitment." 65 Fed. Reg. at 46083. ETA noted that prior to GAL 1-97, RIR had not been fully utilized, but that it had become a procedure that was viewed favorably and encouraged by ETA. Under the proposed rule change, a request to have a previously filed application processed as an RIR request would have to be accompanied by documentary evidence of good faith recruitment conducted within the six months immediately preceding the date of the request.

The Final Rule implementing these amendments was published in 2001. ETA, *Final Rule, Refiling of Applications, Labor Certification Process for the Permanent Employment of*

Aliens in the United States, 20 CFR Part 656, 66 Fed. Reg. 40584 (Aug. 3, 2001). The final rule changed the RIR provision by adding the following paragraph:

> § 656.21 Basic labor certification process.
>
> * * * * *
> (i) * * *
> (6) Notwithstanding the provisions of paragraph (i)(1)(i) of this section, an employer may file a request with the SESA to have any application **filed** on or before August 3, 2001, processed as a reduction in recruitment request under this paragraph (i), provided that recruitment efforts have not been commenced pursuant to paragraph 656.21(f)(1) of this section.
> * * * * *

The preamble to the Final Rule stated, in pertinent part:

> The proposed amendment is simply a housekeeping rule to permit otherwise eligible applications to be processed as RIR applications even though they do not meet the current procedural requirement that the recruitment must have been conducted prior to filing the application.
>
> * * *
> Further, GAL 1-97 makes clear that to be eligible for RIR processing, the application cannot contain deficiencies such as unduly restrictive job requirements.
> * * *
> One additional comment concerning the general justification for the regulatory change was submitted by the SESA, in which they observed that reducing the backlog is not simply a matter of allowing RIR processing. They are of the belief that many of the applications in the queue require additional handling to resolve issues prior to beginning recruitment or being forwarded to the regional office for certification. The Department is aware that this regulatory change is not a panacea and that some level of backlogged applications will continue to exist. The Department agrees that a number of applications in State agency processing queues contain deficiencies and are thus inappropriate for an RIR conversion.

Thus, this rule change promoted the option of post-application recruitment to support an RIR request. Also of note is the discussion in the preamble observing that many applications would "require additional handling to resolve issues prior to beginning recruitment or being forwarded to the regional office for certification," that promotion of RIR "is not a panacea," and that many pending applications "contain deficiencies and are thus inappropriate for an RIR conversion."

ETA was in a tough position in 2001, facing very large backlogs of cases and struggling to find acceptable solutions. This language indicates that ETA recognized that promotion of RIR would not be without its problems. Given this context, we find it understandable that ETA found it necessary to proceed with the rule change. However, for purposes of fully understanding the background to the instant appeals it is noted that ETA was promoting RIR conversion even though it recognized that many applications would have recruitment problems making them questionable candidates for conversion to RIR processing.

2001 General Administration Letter No. 02-02

On November 13, 2001, the Assistant Secretary for ETA issued General Administration Letter No. 02-02, *Foreign Labor Certification: Reduction-in Recruitment Conversion "Q's & A's."* [11] GAL No. 02-02 transmitted the Final RIR Conversion Rule of August 3, 2001 to the State Workforce Agencies, with "Q's and A's" providing "policy and procedure guidance clarifying the intent of the Final Rule." GAL 02-02 at ¶ 1. As pertinent to the issue before the Board, the "Q's and A's" state:

> 8. What if an application is converted to RIR processing in response to an employer request, is forwarded to the Regional Office for a determination, and the RIR request is subsequently denied due to deficiencies such as an inadequate recruitment effort?
>
> (A) The converted RIR application is returned to the state, where it is placed in the "regular" queue according to the priority date of the original application under the basic process, the same place it was previously situated prior to RIR conversion. This is in contrast to the procedure to be followed when a traditional RIR request is denied by the Regional Office. Pursuant to GAL Change 1, when a traditional RIR request is denied the application is placed the regular queue according to the date the application is received by the state after being returned by the Regional Office. It is then treated as a regular application received on that date but it retains the original priority date.

[11] www.ows.doleta.gov/dmstree/gal/gal2k2/gal_02-02a2.pdf

Q & A No. 8 is notable in regard to the issue before the Board because it indicates that a RIR should be denied and returned for regular processing if there was an inadequate recruitment effort.

The Ziegler and Carlson Memoranda

On March 18, 2002, Dale M. Ziegler, then ETA's Chief of the Division of Foreign Labor Certification, issued a Memorandum for Regional Certifying Officers entitled, *Evaluating Reduction in Recruitment (RIR) Requests in an Environment of Increased Layoffs*. This memorandum stated standard operating procedures (SOPs) for Regional COs on evaluating RIR requests where the CO obtained information that there may have been layoffs by the petitioning employer, or in the occupation in the area of intended employment.[12] The memorandum directed that determinations about whether an RIR should be permitted should include an assessment of the availability of U.S. workers based on the recent experience of regional offices, state agency information on the labor market, and information contained in the media. The Memorandum stated that "[i]f, after evaluating all of the information obtained the CO is confident qualified U.S. workers may be available for the occupation involved in the RIR, the RIR request should be denied and returned to the state agency for further processing." The Memorandum, however, then made a distinction between situations where the CO raised the issue of layoffs by the petitioning employer and where the issue of layoffs was based on general layoffs in the industry or occupation, or a combination of the two. Where the CO raised the layoff issue based on the petitioning employer's layoffs, the CO was directed to send a letter to the Employer asking whether layoffs during the prior six months involved the occupation for which labor certification was being sought, the number of such workers, and the consideration given to them. If the employer failed to respond satisfactorily to these questions, the CO was directed to issue an NOF which would "notify the employer of the intention to deny the application if the employer does not respond satisfactorily to the consideration given to the workers it laid off and does not satisfactorily document the consideration given to the workers that were laid off, including the lawful job-related reasons for each U.S. worker that was rejected." Where the CO raised the

[12] As noted in *Compaq Computer Corp.*, 2002-INA-249 at n.3 (Sept. 3, 2003), in regard to the "Zeigler" memoranda, "[w]hen GAL 1-97 was published, the U.S. economy was booming and RIRs were an attractive option for employers having difficulty finding adequate supplies of U.S. workers, especially in high-technology industries. When the economy changed in 2001, and certain industries began laying off workers, questions arose from Regional COs about how to analyze RIRs in view of such layoffs …."

layoff issue based only on general layoffs in the industry or occupation in the area of intended employment, the CO was directed to give the employer the option of publishing one additional advertisement or requesting that the application be remanded to SWA for regular processing.

On May 28, 2002, Mr. Zeigler issued a second Memorandum entitled "*Clarification of Reduction in Recruitment (RIR) Policy in an Environment of Increased Layoffs*." This Memorandum provided clarification on which period of time (the six months prior to filing of the application or the six months prior to the CO's consideration of the RIR request) was relevant. It also revised the instructions to eliminate the preliminary letter step where the CO raised the layoff issue based on layoffs by the petitioning employer; instead, the CO was to proceed directly to issuance of an NOF. The Memorandum stated that a petitioning employer which has laid off workers have "unique obligations" imposed on them. For such employers, the CO could review layoffs either during the six months prior to filing of the application or the six months prior to the time the CO processed the RIR request.

On November 20, 2003, William L. Carlson, a new Chief of the Division of Foreign Labor Certification,[13] issued a Memorandum for All Regional Certifying Officers entitled "*Processing of Regional Office Reduction in Recruitment (RIR) Requests*." This Memorandum provided guidance intended to assist COs in reducing backlogs of RIR requests in view of the contemplated implementation of PERM. The Memorandum expressed a policy of avoiding remands to SWAs for conventional recruitment, and provided a revised procedure for making RIR determinations. First, the COs were to conduct an initial review to determine the completeness of the application, demonstration of a pattern of recruitment, compliance with regulatory requirements such as the absence of restrictive requirements, whether the issue of layoffs had been adequately addressed, and other criteria. The COs, at their discretion could then deny the RIR request. COs would then issue NOFs on applications not meeting completeness/compliance requirements. If the applications met the completeness/compliance review, there were two additional guidelines: (1) If the application appropriately required a bachelor's degree and three or more years of experience, or a Master's degree and six months or more of experience, the application was to be certified. (2) If the application did not meet the

[13] In 2006 ETA renamed the Division of Foreign Labor Certification. It is now referred to as the Office of Foreign Labor Certification.

criteria of guideline 1, it would "be reviewed to determine if the level of recruitment and the detail provided in the recruitment report satisfy the Certifying Officer such that further recruitment is unnecessary." If a retest of the labor market was necessary, the CO was to give the petitioning employer the option to (1) withdraw the application, (2) withdraw the RIR request and have the case remanded to the SWA, or (3) conduct a one-day retest of the labor market in accordance with the CO's instructions.

The portion of the Zeigler memoranda indicating that an application before the CO in the posture of a RIR request could be denied outright for an employer's failure to adequately explain why it did not consider employees that had been laid off rather than remanding for supervised recruitment was, in effect, rejected by the panel decision in *Compaq Computer*, *supra*. The subsequent Carlson memo revising how RIR determinations are processed no longer seems to have directed such a procedure by COs. Of note in regard to the issue presently before the Board is that the Carlson memo indicates that, even though remands were to be avoided, a CO could find in some circumstances that an RIR could not be approved because "the level of recruitment and the detail provided in the recruitment report" did not satisfy the CO that "further recruitment is unnecessary." If such a finding was made by the CO, the Employer was to be given several options, one of which was a remand to the SWA, and another of which was to conduct a one-day retest of the labor market in accordance with the CO's instructions. Thus, it would appear that in 2003 ETA was willing to permit employers to correct recruitment deficiencies either through a remand for supervised recruitment at the SWA or reduced recruitment under the CO's supervision.

2006 Federal Register Notice

On October 6, 2006, ETA published a Notice in the Federal Register announcing a policy that GAL No. 2-02 would remain in effect for RIR conversion purposes for applications filed on or before March 27, 2005. ETA, *Notice, Foreign Labor Certification; Reduction-in-Recruitment (RIR) Conversion; Extension of the RIR Eligibility Date*, 71 Fed. Reg. 59336 (Oct. 6, 2006). On December 22, 2006, ETA posted on its web site *FAQs on RIR Conversion Opportunity*.[14] As

[14] www.foreignlaborcert.doleta.gov/pdf/backlog_faqs_12-22-06.pdf.

discussed more fully below, the FAQs indicate that employers who request conversion must be prepared to document lawful, job-related reasons for rejection of any qualified workers, but do not make it clear whether failure to do so is merely grounds for denial of the RIR, or grounds for denial of the application.

ANALYSIS

(1) *Adequacy of recruitment versus adequacy of consideration of applicants*

The crux of the CO's petition for en banc review is the contention that there is a distinction between the adequacy of recruitment and the adequacy of consideration of the applicants found during the recruitment. The CO argues, in essence, that he considered the recruitment sources to be adequate, and therefore properly granted an RIR, but was still obliged to consider whether applicants were properly considered and legally rejected. In this respect, the CO is relying on the part of the regulation that reads: "If the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer then shall determine, pursuant to § 656.24 whether to grant or to deny the application." §656.21(i)(5). When reading the regulations as a whole, however, we are not convinced that granting an RIR is simply a matter of considering whether the sources of recruitment were adequate.

The text of the RIR regulation at section 656.21(i) speaks to reduction of an employer's "recruitment efforts" under sections 656.21(f) (posting a job order with the SWA) and/or 656.21(g) (newspaper or professional, trade or ethic publication). The regulations do not define "recruitment efforts." The CO's position in the instant appeal is that "recruitment efforts" means only that the employer tested adequate sources for recruitment. The very next provision of regulations at section 656.21(j)(1), however, describes the report that an employer must provide to document "the results of all the employer's post-application recruitment efforts…." The regulation continues:

> The report of recruitment results shall:
> (i) Identify each recruitment source by name;

(ii) State the number of U.S. workers responding to the employer's recruitment;
(iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and
(iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

Thus, this regulation makes a distinction between recruitment efforts and the results of those efforts. One of the results described is an explanation of the lawful job-related reasons for not hiring each U.S. worker interviewed. So, we have a chicken-or-the-egg situation. Is the result of the recruitment efforts the rejection of U.S. workers? Or is the recruitment report merely describing the efforts, which included an interview, consideration, and decision to accept or reject U.S. workers?

Moreover, although our review of the BALCA caselaw and regulatory and interpretative history relating to RIR processing did not provide a definitive answer to the question of whether a CO may grant an RIR, but deny the application for failure to document adequate consideration of U.S. workers or unlawful rejection of a U.S. worker without providing an opportunity for the employer to cure the deficiencies by referral of the application for "supervised" or "traditional" recruitment, we find that the regulatory and interpretative history does not support the CO's contention that there is a distinction between the adequacy of recruitment and the adequacy of consideration of the applicants found during the recruitment. Rather, none of the history limits a CO's consideration whether to grant an RIR to the adequacy of sources used, and if anything strongly suggests that a CO has wide discretion when considering whether to grant an RIR to look at any aspect of the employer's recruitment, whether it be sources of workers, the potential impact of layoffs, whether the job was advertised with restrictive requirements, whether a prevailing wage was offered, whether U.S. workers were rejected for reasons that would be considered unlawful under Part 656, and so forth.

We find the CO's "single comment" about the AILA amicus brief illuminating.[15] In that letter, the CO states:

[15] *See* n.4, *supra*.

> The Department's responsibility in examining applications for permanent labor certification, whether under Reduction in Recruitment (RIR) or Traditional Recruitment (TR) is to ensure that the employer has adequately considered whether there is a ready, willing, able and qualified U.S. worker to fill the position in order to permit the Secretary to accomplish her statutory responsibility to certify whether such workers exist. Under AILA's interpretation of the law, even if the Department concludes that an employer who filed an RIR application unlawfully rejected a qualified U.S. worker, the employer is entitled to a second try under supervised recruitment, without the slightest penalty. Nothing in the regulations or the regulatory history suggests the intention to create such a bifurcated process and which would produce an outcome fundamentally incompatible with the statute.
>
> In addition, such an interpretation is inconsistent with the BALCA decisions concluding that a "fundamentally flawed" (i.e. incurable) RIR application can be denied without resorting to supervised recruitment. See, e.g., Matter of Dial A Beeper, Case No. 2004-INA-285 (BALCA Jan. 26, 2006) (Compaq remand unnecessary when it would be "pointless."); Matter of Rabbi Leib Tropper, Case No. 2004-INA-74 (BALCA May 9, 2004) (same). To conclude otherwise would, for example, offer no penalty for Express Photo's unlawful decision not even to consider a qualified U.S. worker. AILA makes no argument that the subject applications were not "fundamentally flawed" in this regard and, therefore, the Department's decision must be affirmed, even if AILA's APA argument which the Department disputes were to be accepted.

(CO's letter of December 22, 2006). We find that the CO's logic and assumptions about the nature of the regulatory scheme are flawed. First, it is clear that the RIR procedure is, on its face, a bifurcated process. Second, the CO is not empowered to "penalize" an employer who files an inadequate RIR request. Rather, at least where the RIR is based on pre-application recruitment, the CO's option is to deny the RIR and refer the application for supervised recruitment with appropriate instructions if there are special sources of recruitment – such as laid off workers – which the CO finds need to be considered.[16] Third, defects in pre-application

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[16] *See* 20 C.F.R. § 656.21(b)(3), which provides the CO with the discretion to require special recruitment efforts even after the application is filed if appropriate to the occupation. It is true that 20 C.F.R. § 656.24(b)(2)(i) permits a CO to deny certification if "there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers." But section 656.21(i)(5) only invokes section 656.24 if the CO grants a complete RIR. It would be absurd for the CO to "grant" a complete RIR but then immediately deny the application outright for failure to consider other appropriate sources of workers.

recruitment used to support an RIR request, such as an "unlawful" rejection of a U.S applicant,[17] are not fundamental, incurable flaws that cannot be cured through supervised recruitment.

Thus, an employer, whose pre-application recruitment may not have been adequate under DOL criteria for conducting an acceptable recruitment, whether it be stating job requirements not required of the Alien, an unduly restrictive job requirement,[18] failure to timely contact U.S. applicants, not presenting a "lawful" (within the meaning of the labor certification regulations) grounds for rejecting a U.S. applicant, are all reasons for not granting the RIR and requiring the employer to go through supervised recruitment – or for only partially granting the RIR and requiring directed actions to rectify the deficiency to the CO's satisfaction.

The bottom line is that neither the text of the regulations, nor the BALCA caselaw, nor regulatory history, nor the staff guidelines or interpretative statements of ETA prior to the instant cases narrowly define "recruitment efforts" as meaning only reviewing an RIR for the adequacy of recruitment sources. In the absence of definitive authority supporting the CO's position on appeal, the Board will seek to interpret the RIR regulations consistent with notions of fundamental fairness and procedural due process. *See generally HealthAmerica*, 2006-PER-1 (July 18, 2006)(en banc). At least in cases where the RIR request is based on pre-application recruitment, it is unfair to hold employers to Part 656 standards for recruitment. As originally

[17] In some of the pleadings in these matters, a party took offense at characterization of its pre-application recruitment as "unlawful." The regulations, caselaw and professional commentary on the pre-PERM permanent labor certification program is filled with references to "unlawful" rejection of U.S. applicants. This has been a shorthand way of saying that an employer must only use criteria specified in its application and advertisements, which was not challenged by the CO as unduly restrictive, as a ground for rejecting U.S. applicants for the position. There are reasons, however, that an employer might reject job applicants that would not be unlawful outside of the labor certification context. For example, it has long been recognized that a minimally qualified U.S. applicant cannot be rejected merely because the sponsored alien is better qualified. Picking the best qualified applicant is, in non-immigration cases, often perfectly legal and merely good business judgment.

[18] The CO, however, would act reasonably in testing whether an employer would eliminate, modify or justify by business necessity an unduly restrictive job requirement prior to remanding for supervising recruitment. If an employer refuses to eliminate or reasonably modify such a requirement, or fails to establish business necessity for such a requirement, the case would fall into the category of those that do not need to be remanded but could be dismissed on the merits. Similar procedures would be reasonably followed if the prevailing wage was in question, or there was a question whether the position offered was a bona fide job opportunity, or there was some other potentially "fatal" defect with the application. *See* n. , *supra*. However, untimely contact or unlawful grounds for rejection of applicants are deficiencies that an employer could remedy with supervised recruitment. Although the Board has approved the concept of good faith recruitment, we will not extend that concept to pre-application recruitment supporting an RIR request.

promulgated, it is apparent that the RIR process was intended to provide an option for avoiding supervised recruitment where it was clear that the employer's original efforts were adequate – and not a trap for those who recruited without labor certification criteria in mind or whose recruitment might later be questioned based on company or industry layoffs.[19]

(2) *Adequacy of relief*

The CO also argues that the RIR regulation renders it impossible for the Employers to cure the faults with their applications because all three Employers had before them, at the time of recruitment, apparently qualified U.S. workers. The CO argues that the Employers were required to either offer those U.S. workers employment or adequately explain why the employers did not do so. The CO also contends that even if "there was some action that the employers could undertake to cure the faults with their applications, the recruitment required by the panel would not do so." This contention is based on the theory that the remand orders would have only resulted in new newspaper advertisements and local job service orders. Thus, according to the CO, the problem of laid-off workers would not be addressed during supervised recruitment. This contention is based on the regulatory language which states: "Unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required by §§ 656.20(g), 656.21(f), 656.21(g), and 656.21 (j) of this part (i.e., by post-application internal notice, employment service job order, and advertising; and a wait for results)." 20 C.F.R. § 656.21(i)(5).

[19] We recognize that as the RIR procedure started to be promoted by ETA, savvy immigration attorneys and representatives would advise clients to conduct pre-application recruitment knowing that it would used to support an RIR application. Thus, to a certain extent such employers would not be innocent players who did not know, for example, that they could not reject U.S. workers for reasons not permitted under Part 656, but which would be perfectly lawful and reasonable outside the labor certification context. However, an inquiry into an employer's knowledge of the rules prior to engaging in the recruitment used to support an RIR would be an impractical and degenerative exercise. It should be noted, however, that the cases *sub judice* involved RIR requests based on pre-application recruitment. We decline to make a ruling on whether today's decision applies to RIR requests based on post-application recruitment.

However, this language does not support the CO's contention. Plainly, it permits the CO to fashion a "remand" order requiring the employer to "recruit workers to the extent required in the Certifying Officer's decision." In other words, the fact that the regulations expressly require supervised recruitment "in the manner required by §§ 656.20(g), 656.21(f), 656.21(g), and 656.21 (j)" does not limit the CO's discretion to require other types of recruitment, such as consideration of laid off workers. Thus, if the CO wants the Employers to consider laid-off workers, he or she has the full discretion to so require during supervised recruitment.

ORDER

Based on the foregoing, we find that the panel decisions in *Express Photo, Inc.*, 2005-INA-128 and 139 (Aug. 11, 2006) and *Sprint United Management Co*., 2006-INA-6 through 8, 10 through 12 (Aug. 21, 2006) were properly decided. Accordingly, we **AFFIRM** those decisions and **REMAND** the matters for further proceedings consistent with the above.[20]

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge

[20] In its appellate brief, Express Photo argues that because it was offering two positions, but the CO only found that one U.S. applicant had been unlawfully rejected, one of its applications should be approved and the other remanded for supervised recruitment. The same pre-application recruitment, however, was used to support an RIR request for both applications. The panel in *Express Photo* affirmed the CO's finding that the pre-application recruitment was deficient because the Employer unlawfully (under labor certification law) rejected a U.S. applicant as overqualified. That deficiency rendered the pre-application recruitment unusable to support a RIR for the labor certification applications. The fact that there were two applications does not remedy the deficiency as to one of the applications. Accordingly, we hold that both Express Photo applications must be referred for supervised recruitment.